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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CHARLES BERTINI

Plaintiff,

V.

APPLE INC.,

Defendant.

CASE NO. 24-CV-03437-YGR

DEFENDANT APPLE INC.'S MOTION TO DISMISS

Complaint Filed Date: June 7, 2024

Hearing Date: December 3, 2024

Hearing Time: 2:00 p.m.

Judge: Hon. Yvonne

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 3, 2024 at the 2:00 p.m. Oakland Courthouse, Courtroom 1, 4th Floor, at 2:00 p.m. or as soon thereafter as the matter may be heard, before the Honorable Yvonne Gonzalez Rogers, United States District Judge for the Northern District of California, Defendant Apple Inc. (“Apple”) will and does hereby move for dismissal of Plaintiff Charles Bertini’s (“Bertini”) Complaint.

Apple seeks dismissal of the above-named claims against it under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the declaration of Mary Mazzello and supporting exhibits that have been incorporated by reference into the Complaint, the papers on file in this matter, the arguments of counsel, and any other matter the Court wishes to consider.

DATED: October 4, 2024

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is an appeal from the United States Patent and Trademark Office’s (“USPTO”) Trademark Trial and Appeal Board (“TTAB”) related to the APPLE trademark. Plaintiff Bertini seeks to overturn the USPTO’s decisions in favor of Apple. First, Bertini challenges the USPTO’s decision refusing to cancel Apple’s twelve-year-old federal registration of the APPLE service mark for educational and entertainment services (Reg. No. 4088195, the “APPLE Registration”) on the basis of abandonment. Second, he attempts—for the fourth time—to cancel the APPLE Registration on the basis of fraud after the USPTO dismissed all his previous attempts, the last with prejudice. Each of his claims should be dismissed.

The abandonment claim fails because, even as Bertini's own Complaint asserts, Apple *used* its APPLE mark in connection with entertainment services. Apple thus plainly did not intend to abandon its mark for entertainment services, as required for Bertini to establish abandonment. The abandonment claim also fails because Bertini seeks to cancel Apple's *entire* registration on the basis of purported nonuse, yet the Complaint does not even attempt to allege nonuse with respect to educational services. Instead, it contains allegations of nonuse with respect to entertainment services only.

With respect to fraud, the TTAB repeatedly dismissed Bertini’s fraud claims as merely conclusory, warning him to review Rule 11 of the Federal Rules of Civil Procedure and ensure that he has a sound factual basis for alleging any further fraud claims. *Bertini v. Apple Inc.*, Cancellation No. 92068213, 2018 WL 5016953, at *8 (Oct. 9, 2018) (the “2018 TTAB Decision”). Yet Bertini alleges three fraud claims here on the theory that Apple purportedly was not using the APPLE mark in connection with entertainment services when it told the USPTO that it was. These claims should be dismissed because Bertini again relies on mere conclusory allegations. Apple also submitted a specimen of use to the USPTO showing its use of the APPLE mark in connection with entertainment services, and the USPTO accepted such evidence. Apple, thus, could not have committed fraud in stating that it used the mark for such services at the time it submitted the specimen.

Accordingly, for the reasons stated herein, Apple respectfully requests that this Court dismiss Bertini's abandonment and fraud on the USPTO claims.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Apple and its Application to Register the APPLE Trademark in Class 41**

3 Apple is a consumer technology and services company with “well known” goods and services
 4 “both in the U.S. and abroad.” Dkt. 4 (“Compl.”) ¶74. Unsurprisingly, Apple has used its APPLE mark in
 5 connection with a wide range of goods and services, including many educational and entertainment
 6 services. Even by Bertini’s telling, these services include “Apple Special Event[s]” where Apple
 7 introduces new products; an “Apple Keynotes podcast” that includes “video of [Apple’s] most important
 8 announcements;” an “Apple Education Event;” and a music entertainment service called “Apple Music.”
 9 *Id.* at ¶¶44–62, 73, 83, 84.

10 On March 22, 2008, Apple applied to register the APPLE mark for various educational and
 11 entertainment services (the “Application”). *Id.* at ¶22. The USPTO published the Application for
 12 opposition on February 16, 2010, allowing any interested party to oppose it. Declaration of Mary Mazzello
 13 (“Mazzello Decl.”) Ex. F.¹ After no party opposed, the USPTO issued a Notice of Allowance providing
 14 Apple six months to submit a Statement of Use along with a specimen demonstrating use of the mark
 15 (with at least one of the applied-for-services). *Id.* Ex. G. The USPTO allows parties to extend this deadline
 16 up to five times, with each extension lasting six months. 15 U.S.C. § 1051(d)(2); *Trademark Manual of*
 17 *Examining Procedure* § 1108.01.

18 Apple received two such extensions of time. Compl. ¶94. Then, on November 11, 2011, Apple
 19 filed a Statement of Use verifying that the APPLE mark was in use on all of the services listed therein. *Id.*
 20 at ¶¶94–96. Thomas La Perle—a Senior Director in Apple’s Legal Department, managing Apple’s
 21 Trademark and Copyright Group, who has been employed continuously by Apple as a trademark attorney
 22 since September 1999—signed the Statement of Use confirming that the mark was in use in commerce on
 23 or in connection with all the services listed therein (the “SOU Declaration”). *Id.* Mr. La Perle also
 24 submitted the following specimen with the Statement of Use showing use of the mark in connection with
 25 services listed in the application.

26

¹ All exhibits referenced herein are attached to the Declaration of Mary Mazzello. As discussed in Section
 27 III below, public filings related to the Application and the TTAB proceeding from which this appeal arises
 28 have been incorporated-by-reference into the Complaint and, thus, Apple refers to information in those
 filings here.



Mazzello Decl. Ex. A at 6. Shortly thereafter, on December 13, 2011, the USPTO issued a Notice of Acceptance of the Statement of Use, and then issued the APPLE Registration on January 17, 2012 for the the following services:

Educational/Informational Services: “Education and training services, namely, arranging and conducting personal training, classes, workshops, conferences and seminars in the field of computers, computer software, online services, information technology, website design, and consumer electronics; arranging professional workshop and training courses; computer education training services; training in the use and operation of computers, computer software and consumer electronics; online journals, namely, blogs featuring general interest topics covering a wide variety of topics and subject matter; providing on-line publications in the nature of magazines, newsletter and journals in the field of computers, computer software and consumer electronics.

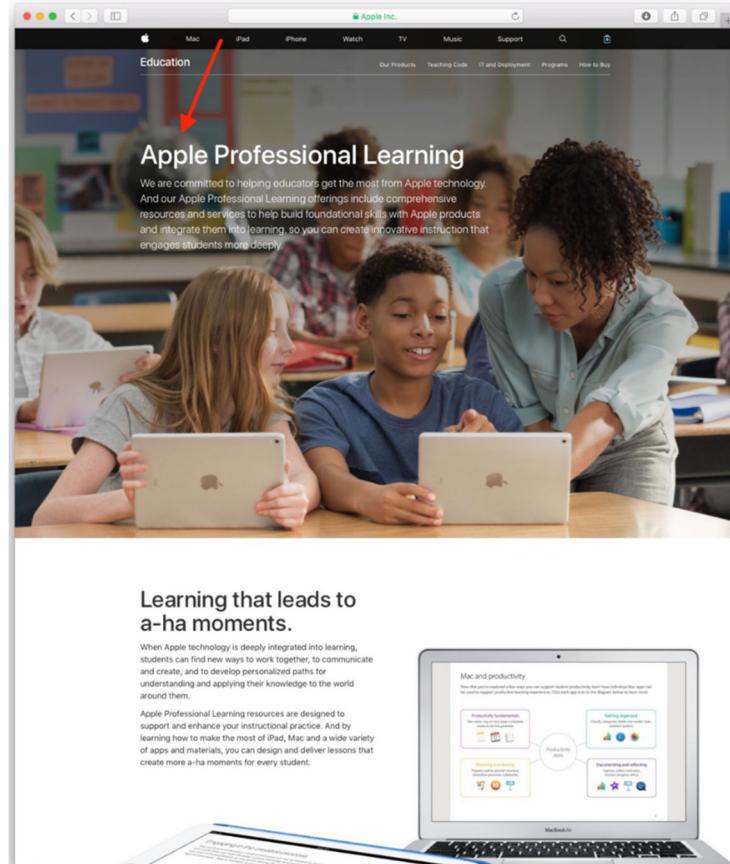
Entertainment services: “providing information, podcasts and webcasts in the field of entertainment via the Internet concerning movies, music, videos, television, sports, news, history, science, politics, comedy, children’s entertainment, animation, culture, and current events; digital video, audio and multimedia publishing services; providing entertainment information regarding movies, music, videos, television, sports, news, history, science, politics, comedy, children’s entertainment, animation, culture, and current events; providing information, reviews and personalized recommendations of movies, music, videos, television, sports, news, history, science, politics, comedy, children’s entertainment, animation, culture, and current events in the field of entertainment; entertainment services, namely, production of live musical performances; entertainment services, namely, providing live musical performances online via a global computer network; rental of digital entertainment content in the nature of movies, music, videos, television, sports, news, history, science, politics, comedy, children’s entertainment, animation, culture, and current events, by means of communications networks, namely, provision of non-downloadable audio and audiovisual programs via an online video-on-demand service; providing a database of digital entertainment content in the nature of movies, music, videos, television, sports, news, history, science, politics, comedy, children’s entertainment, animation, culture, and current events via electronic communication networks; entertainment services, namely, providing prerecorded audio and audiovisual content, information and commentary in the fields of music, concerts,

1 videos, movies, television, books, news, sports, games and cultural events all via a global
 2 computer network.”²

3 Compl. ¶101.

4 Apple has used the APPLE mark on all of those services and maintained the registration ever since.

5 On January 17, 2018, Apple submitted a Declaration of Use (combined with a Declaration of
 6 Incontestability) as part of a routine maintenance filing for the APPLE Registration. *Id.* at ¶122. The
 7 declaration again included a statement by Mr. La Perle that the APPLE mark was “in use in commerce on
 8 or in connection with all goods or services listed” in the APPLE Registration (the “2018 La Perle
 9 Declaration”). *Id.* As required for such declarations, Apple included with the submission a specimen
 10 showing current use of the APPLE mark for services listed in the registration, shown below.



25 Ex. B at 8.

26

27

28 ² Apple has divided the services into two groups for the Court’s ease of reference, but notes that Bertini
 has not stated which services he believes are “educational” services versus “entertainment” services.

1 One month later, the USPTO notified Apple that its declaration and specimen of use submission
 2 were acceptable but the APPLE Registration had been randomly selected for audit, requiring Apple to
 3 submit additional “proof of use” for some specific educational and entertainment services. *Id.* at ¶108; Ex.
 4 C at 2. Apple complied and submitted a specimen showing use of “Apple Machine Learning Journal” for
 5 the educational services of “providing on-line publications in the nature of magazines, newsletter and
 6 journals in the field of computers” and a specimen (inserted below) showing use of the mark for
 7 “entertainment services, namely, production of live musical performances.”



18 Ex. D at 5. In addition, Apple trademark attorney Senior Counsel Karen Kitterman submitted a statement
 19 affirming that Apple was “using the mark in commerce on or in connection with the goods and/or services
 20 identified in the registration for which use of the mark in commerce is claimed, as evidenced by the
 21 submitted proof of use, during the relevant period for filing the affidavit of use” (the “Kitterman
 22 Declaration”). Compl. ¶109. The USPTO approved this submission, stating that “the evidence of proof of
 23 use is acceptable, and therefore the owner has satisfied the requirements of the audit outlined in the
 24 February 22, 2018 Office action.” *Id.* at ¶118.

25 **B. Bertini and His Attempt to Cancel the APPLE Registration**

26 On June 5, 2016, Bertini filed a trademark application to register APPLE JAZZ with the USPTO
 27 in Class 41 for a variety of entertainment services. *Id.* at ¶8. The USPTO refused registration due to a
 28

1 likelihood of confusion with a large number of Apple's earlier filings, including the APPLE Registration
 2 that is the subject of this dispute. *Id.*³

3 On March 19, 2018, Bertini filed a Petition to Cancel the APPLE Registration before the TTAB,
 4 alleging abandonment and fraud on the USPTO based on the SOU Declaration ("Cancellation
 5 Proceeding"). *See id.* at ¶¶9–10. On May 4, 2018, Apple moved to dismiss. Ex. E (T.T.A.B. Docket, Entry
 6 No. 5). Bertini amended his cancellation petition before the TTAB could decide Apple's motion to
 7 dismiss. *Id.* (Entry No. 6); *see also* Compl. ¶10 (admitting the amendment, but erroneously stating it
 8 occurred on October 24, 2018). The amended petition asserted *seven* fraud claims based on the SOU
 9 Declaration and Apple again moved to dismiss. *See* 2018 TTAB Decision at *1; Ex. E (Entry No. 7). On
 10 October 9, 2018, the TTAB granted Apple's motion, holding that Bertini's fraud claims based on
 11 statements in the SOU Declaration were "conclusory and not supported by sufficient facts to infer the Mr.
 12 La Perle acted with the intent to deceive the USPTO." 2018 TTAB Decision at 8. The TTAB also warned
 13 Bertini:

14 "[B]ecause Petitioner has accused Respondent of committing fraud under seven separate sets of
 15 facts, including several claims that are not warranted by existing law, the allegations appear to be,
 16 at a minimum, based on an insufficient inquiry under the circumstances. Thus, **Petitioner is**
 17 **advised to review Rule 11** of the Federal Rules of Civil Procedure and ensure that he has a sound
 factual basis for alleging any grounds to refuse registration other than abandonment."

18 *Id.* The Board also included a quote from McCarthy on Trademarks & Unfair Competition admonishing
 19 Bertini that: "Applicants and registrants should not be subjected to harassment by loosely framed and ill-
 20 considered charges of fraud." *Id.* at *8 n.9.

21 Undeterred, Bertini attempted a third time to cancel the APPLE Registration, filing his second
 22 amended petition on October 28, 2018. Ex. E (Entry No. 12). In April 2019, the TTAB dismissed Bertini's
 23 claims of fraud on the USPTO, this time with prejudice, reasoning that "[b]ecause the Board has found
 24 that Petitioner failed to sufficiently plead his seven asserted counts of fraud in his first amended petition

25 ³ The Complaint in ¶8 asserts that the USPTO refused the APPLE JAZZ application due to a likelihood of
 26 confusion with the APPLE Registration. The USPTO in fact refused his APPLE JAZZ application due to
 27 likelihood of confusion with four of Apple's APPLE and APPLE MUSIC incontestable registrations.
 28 Thus, even if this APPLE Registration were cancelled, the USPTO has maintained Apple's APPLE (U.S.
 Reg. 2034964), APPLE (U.S. Reg. 3317089) and APPLE MUSIC (U.S. Reg. 5330141) registrations as
 bars to his application. Bertini has not attempted to cancel any of the other cited registrations.

1 for cancellation and Petitioner has again failed to plead a legally sufficient fraud claim in his second
 2 amended petition, the Board finds that granting leave to replead the fraud claim would not serve the
 3 interests of justice.” Order, *Bertini v. Apple Inc.*, Cancellation No. 92068213, 18 TTABVUE 3 (T.T.A.B.
 4 April 11, 2019).

5 This decision left only Bertini’s claim of abandonment for trial before the TTAB. Yet after a full
 6 opportunity to take discovery and present his abandonment case, the TTAB rejected this claim as well,
 7 finding as a factual matter that “Petitioner has not presented a prima facie case of abandonment based on
 8 three years of nonuse of the APPLE mark for any services identified in the challenged registration.” *Bertini*
 9 *v. Apple Inc.*, Cancellation No. 92068213, 2024 WL 1231233, at *13 (T.T.A.B. Mar. 20, 2024). The TTAB
 10 also noted that because Bertini had failed to make a prima facie case, it “need not look to Respondent’s
 11 use of its APPLE mark in connection with its recited services. Nonetheless, [it noted] that Respondent
 12 [had] introduced evidence of use of its APPLE mark alone in connection with its recited services.” *Id.* at
 13 *12 n.14. It further found that “Respondent’s use of, e.g., APPLE TV, APPLE STORE or APPLE MUSIC
 14 all feature the distinctive term APPLE and a generic term. Such use supports Respondent’s use of APPLE
 15 in connection with the services identified in this evidence.” *Id.* at 12.

16 Bertini now appeals this decision on abandonment in yet another attempt to cancel the APPLE
 17 Registration and is attempting for a fourth time to plead fraud. Apple’s counsel and Bertini’s counsel met
 18 and conferred on July 22, 2024, regarding this motion to dismiss, and Apple provided Bertini’s counsel
 19 with relevant case law. Bertini, however, refused to amend his Complaint. Thus, for the reasons discussed
 20 below, Bertini’s claims should be dismissed.

21 **III. DOCUMENTS INCORPORATED BY REFERENCE**

22 Under the “incorporation by reference” doctrine, a court may treat a document as though it is
 23 incorporated into the complaint itself “if the plaintiff refers extensively to the document or the document
 24 forms the basis of the plaintiff’s claim.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th
 25 Cir. 2018). “The doctrine prevents plaintiffs from selecting only portions of documents that support their
 26 claims, while omitting portions of those very documents that weaken—or doom—their claims.” *Id.* “[A]
 27 court “may assume [an incorporated document’s] contents are true for purposes of a motion to dismiss
 28 under Rule 12(b)(6).” *Id.* at 1003 (quoting *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)).

1 Here, the following documents have been incorporated by reference into the Complaint:

- 2 • The November 11, 2011 Statement of Use, attached as Exhibit A to the declaration of Mary Mazzello. This Statement of Use has been incorporated by reference because it forms the basis for Bertini's Second Cause of Action for fraud on the USPTO, which is based on La Perle's statement in this document. Compl. ¶¶93–106.
- 3
- 4
- 5 • The January 17, 2018 Combined Declaration of Use and Incontestability under Section 8 & 15, attached as Exhibit B to the Mazzello Declaration. This document has been incorporated by reference because it forms the basis for Bertini's Fourth Cause of Action for fraud on the USPTO, which is based on La Perle's statement in this maintenance document. Compl. ¶¶121–129.
- 6
- 7
- 8 • The February 22, 2018 Post Registration Office Action, attached as Exhibit C to the Mazzello Declaration. This document has been incorporated by reference because the Complaint quotes a portion of this Office Action in Paragraph 108 and alleges that Apple committed fraud on the USPTO through its response to this Office Action. Compl. ¶¶107–120. Therefore, the Office Action provides necessary context for understanding the claim against Apple. Further, incorporating the document prevents Bertini from merely selectively quoting the portions that allegedly support his claim.
- 9
- 10
- 11
- 12 • The August 21, 2018 Response to Office Action for Post-Registration Matters, attached as Exhibit D to the Mazzello Declaration. This document has been incorporated by reference because it forms the basis for Bertini's Third Cause of Action for fraud on the USPTO, which is based on Kitterman's statements in this post-registration document. Compl. ¶¶107–120.
- 13
- 14
- 15 • The docket from the underlying TTAB proceeding, attached as Exhibit E to the Mazzello Declaration. This docket has been incorporated by reference, as this entire case is Bertini's attempt to overturn the TTAB's decision refusing to cancel the APPLE Registration. For example, one of the jurisdictional bases for this case is that it is an appeal from the TTAB's decision. Compl. ¶3 (citing 15 U.S.C. § 1071 Appeal to Court). Bertini also references various events from the cancellation proceeding, such as the date the action was filed, Bertini's filing of an amended cancellation petition, suspension of the cancellation proceeding, and the final decision in the cancellation proceeding. Compl. ¶¶10, 13, 16–19. This document shows the accuracy and inaccuracy of these various descriptions and shows the full list of filings made in the TTAB proceeding, not just those about which Bertini wants this Court to know.
- 20
- 21 • The January 27, 2010 Notice of Publication and May 11, 2010 Notice of Allowance for the APPLE Registration, attached as Exhibits F and G to the Mazzello Declaration. The documents concern the prosecution of the APPLE Registration that is the subject of this proceeding. Bertini provides details regarding the statements of use and extensions of time requested in connection with prosecuting this registration, but omits information about publication and the allowance of the marks by the USPTO. Admitting these documents prevents Bertini from selectively citing certain documents related to the prosecution of the APPLE Registration, but not others.
- 22
- 23
- 24
- 25

26 Alternatively, the Court may take judicial notice of the above-referenced documents, as
 27 “[m]aterials in the online files of the USPTO and other matters of public record are proper subjects of

1 judicial notice.” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Motul S.A. v. USA Wholesale Lubricant, Inc.*, 686 F. Supp. 3d 900, 909 (N.D. Cal. 2023).

3 **IV. ARGUMENT**

4 **A. Legal Standard**

5 The Court should dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) because
 6 it fails to include “a short and plain statement of the claim showing that the pleader is entitled to relief”
 7 under Rule (8)(a)(2) and also fails to satisfy the heightened pleading standard applicable to fraud claims
 8 under Rule 9(b). Rule 8 requires a plaintiff to plead “enough facts to state a claim to relief that is plausible
 9 on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), while Rule 9(b) requires allegations of
 10 fraud to be pleaded with particularity. “A claim has facial plausibility when the plaintiff pleads factual
 11 content that allows the court to draw the reasonable inference that the defendant is liable for the
 12 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under either rule, however, the Court
 13 need not accept as true allegations contradicted by judicially noticeable facts and it “may look beyond the
 14 plaintiff’s complaint to matters of public record.” *Teeter-Totter, LLC v. Palm Bay Int’l, Inc.*, 344 F. Supp.
 15 3d 1100, 1104–05 (N.D. Cal. 2018) (citing *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000);
 16 *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)). The Court is also not required to “assume the truth
 17 of legal conclusions merely because they are cast in the form of factual allegations.” *Fayer v. Vaughn*,
 18 649 F.3d 1061, 1064 (9th Cir. 2011) (quoting *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)).

19 Under 15 U.S.C. § 1071(b)(1), parties may initiate civil actions in federal district court to appeal
 20 TTAB decisions. This is an alternative avenue to appeal to the Federal Circuit and is framed as a civil suit
 21 against the adverse party from the TTAB proceeding. 15 U.S.C. § 1071(b)(1); § 1071(b)(4). The Director
 22 of the USPTO is not a party to the suit but shall have the right to intervene. § 1071(b)(2).

23 **B. Bertini’s First Claim (Abandonment) Fails Because Bertini Did Not Allege Facts
 24 Supporting Non-Use of the APPLE Trademark**

25 Plaintiff’s claim that Apple abandoned its APPLE mark must be dismissed. A plaintiff pursuing a
 26 claim of abandonment through nonuse must allege that (1) the mark’s use has been discontinued and (2)
 27 the owner of the mark intended not to resume such use. 15 U.S.C. § 1127. “Abandonment of a trademark,
 28 being in the nature of a forfeiture, must be strictly proved.” *Prudential Ins. Co. of Am. v. Gibraltar Fin.*

1 *Corp. of Calif.*, 694 F.2d 1150, 1156 (9th Cir. 1982); *Threshold Enters. Ltd. v. Lifeforce Digital Inc.*, No.
 2 22 Civ. 06483, 2024 WL 1643697, at *2 (N.D. Cal. Apr. 15, 2024). Because registrations are “presumed
 3 valid, the party seeking cancellation must rebut this presumption by a preponderance of the evidence.”
 4 *On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000).

5 When seeking cancellation of an entire registration for abandonment—as Bertini does here,
 6 Compl. ¶92—a plaintiff must show the registered mark’s discontinuance with all of the services listed in
 7 the registration. *See Electro Source, LLC v. BrandessKalt-Aetna Grp., Inc.*, 458 F.3d 931, 938 (9th Cir.
 8 2006) (“[A]bandonment requires complete cessation or discontinuance of trademark use”). Cancellation
 9 of an entire registration based on abandonment is inappropriate where a plaintiff avers abandonment for
 10 only *some* of the services covered by the registration. *See, e.g., DC Labs Inc. v. Celebrity Signatures Int'l,*
 11 *Inc.*, No. 12 Civ. 01454, 2013 WL 4026366, at *2 (S.D. Cal. Aug. 6, 2013) (finding that plaintiff failed to
 12 state a claim where complaint only alleged non-use of some of the goods in the registrations).

13 There are two reasons why the Court should dismiss Bertini’s abandonment claim. **First**, as Bertini
 14 acknowledges, Apple uses the APPLE mark for the registered services. Bertini’s Complaint thus
 15 undermines any claim that Apple intended not to resume use of the APPLE mark for entertainment
 16 services,⁴ which is required to establish abandonment. 15 U.S.C. § 1127 (abandonment requires (a)
 17 discontinuance, and (b) intent not to resume use). To allege intent not to resume use, Bertini relies on the
 18 statutory presumption that nonuse for three consecutive years constitutes *prima facie* evidence of
 19 abandonment. Compl. ¶92. But even assuming arguendo that Apple did not use the APPLE mark for three
 20 years for entertainment services, Bertini still fails to state a claim for abandonment because his own
 21 Complaint asserts that Apple *used* the APPLE mark for various entertainment services after the three year
 22 period. *See Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 1392 (Fed. Cir. 2010) (“The [court]
 23 may consider evidence and testimony regarding [the registrant’s] practices that occurred before or after
 24 the three-year statutory period to infer [the registrant’s] intent to resume use during the three-year
 25 period.”). For example, Bertini alleges that Apple produced the “Apple Music Festival” in 2015 and 2016;
 26

27 ⁴ Apple also uses its APPLE mark for educational services, Compl. ¶48 (Apple Education Event held in
 28 2012), but Bertini does not seek cancellation on the grounds of purported nonuse with educational
 services.

1 offered an “Apple Keynotes podcast” that included “video of the company’s most important
 2 announcements;” and used the trademark APPLE MUSIC to “identify Apple’s entertainment services
 3 beginning at least as early as October 26, 2018.” *Id.* at ¶¶46, 73, 84. Therefore, there could not have been
 4 an intent not to resume use, as the Complaint itself alleges *use* of the APPLE mark. The abandonment
 5 claim should be dismissed for this reason as well.

6 Bertini’s position seems to be that using the term APPLE in connection with other words (e.g.,
 7 “MUSIC” or “TV”) does not constitute evidence of use of the APPLE mark, but this is not the law. As the
 8 TTAB noted, “[t]he addition of a generic or highly descriptive term does not necessarily detract from the
 9 separate commercial impression created by the mark APPLE alone.” *Bertini*, 2024 WL 1231233, at *12;
 10 *see also, e.g., Am. Sec. Bank v. Am. Sec. & Tr. Co.*, 571 F.2d 564, 567 (C.C.P.A. 1978) (“the word ‘bank’
 11 is purely descriptive and adds nothing to the origin-indicating significance of AMERICAN SECURITY”
 12 which is the legal equivalent of AMERICAN SECURITY BANK.); *In re Raychem Corp.*, 12 U.S.P.Q.2d
 13 1399, 1399–1400 (T.T.A.B. 1989) (specimen displaying TR06AI-TINEL-LOCK-RING 07/22/87
 14 supported registration for TINEL-LOCK because the alphanumeric part number and generic designation
 15 Ring were not essential to the commercial impression of the mark and played no integral role in
 16 distinguishing applicant’s goods); *Nat'l Bakers Servs., Inc. v. Hain Pure Food Co., Inc.*, 207 U.S.P.Q.
 17 701, 701 (T.T.A.B. 1980), (HOLLYWOOD HEALTH FOODS legal equivalent of HOLLYWOOD);
 18 *Belstone Cap., LLC v. Bellstone Partners, LLC*, No. 2:16 Civ. 01124, 2017 WL 1153111, at *7–9 (E.D.
 19 Cal. Mar. 28, 2017) (use of the phrase “Bellstone Partners, LLC” constituted use of “Bellstone”). This is
 20 true even when the combined phrase is itself a trademark. *See, e.g. Bertini*, 2024 WL 1231233, at *12
 21 (finding use of APPLE MUSIC to constitute use of APPLE, where APPLE MUSIC was a registered
 22 mark); *Nat'l Bakers Servs.*, 207 U.S.P.Q. (BNA) at 701 (prior registered mark HOLLYWOOD HEALTH
 23 FOODS legal equivalent of applied-for HOLLYWOOD mark). In fact, as shown above and discussed
 24 more below, the USPTO accepted a specimen showing use of the phrase APPLE MUSIC⁵ as evidence

25
 26
 27 ⁵ As the USPTO acknowledged with regards to the APPLE MUSIC mark, APPLE is the more distinctive
 28 wording, followed by the descriptive term MUSIC. MUSIC is accordingly disclaimed in U.S. Registration
 No. 5330141 for the mark APPLE MUSIC.

1 that Apple uses the APPLE mark for entertainment services. Accordingly, Bertini's argument should be
 2 rejected.

3 **Second**, Bertini fails completely to allege nonuse of the APPLE mark in connection with
 4 educational services. *See, e.g.*, Compl. ¶¶36, 40, 64, 65, 77 (“Prior to and on the date of the Statement of
 5 Use (‘SOU’) for application of APPLE mark and during a period of at least three years and six months
 6 after the date of the SOU the Mark was not used in commerce on or in connection with **entertainment**
 7 **services** listed in the Registration Certificate.” (emphasis added)). Nonetheless, Bertini seeks cancellation
 8 of the **entire** registration. This is not proper. Because Bertini has failed to allege any facts concerning
 9 purported nonuse in connection with educational services, his claim for complete abandonment is
 10 inappropriate and should be dismissed. *See DC Labs Inc.*, 2013 WL 4026366, at *2 (plaintiff failed to
 11 state a claim where it alleged non-use of some of the goods in the registrations, but not all). Alternatively,
 12 his first cause of action for abandonment should be dismissed as it relates to educational services.

13 **C. Bertini's Fraud on the USPTO Claims Fail Because They Are Conclusory**

14 Bertini's latest attempt at a fraud claim must also be dismissed. To succeed on his fraud claim,
 15 Bertini must demonstrate: (1) a false representation of material fact; (2) knowledge or belief that the
 16 representation is false; (3) intent to induce reliance upon the misrepresentation; (4) the PTO's reliance on
 17 the misrepresentation; and (5) damages proximately caused by that reliance. *OTR Wheel Eng'g, Inc. v. W.*
18 Worldwide Servs., Inc., 897 F.3d 1008, 1019 (9th Cir. 2018). Under Rule 9(b)'s heightened pleading
 19 standard, “a mere conclusory allegation that trademark registration rights were obtained or maintained by
 20 fraud is not sufficient.” 4 *McCarthy on Trademarks and Unfair Competition* § 31:84 (5th ed.); *accord*
21 Bellstone, 2017 WL 1153111, at *7–9 (dismissing “specious at best” fraud claims that relied on accurate
 22 specimens submitted to USPTO). The party asserting fraud on the USPTO bears a “heavy” burden. *In re*
23 Bose Corp., 580 F.3d 1240, 1243 (Fed. Cir. 2009). Indeed, “the very nature of the charge of fraud requires
 24 that it be proven ‘to the hilt’ with clear and convincing evidence. There is no room for speculation,
 25 inference or surmise and, obviously, any doubt must be resolved against the charging party.” *Id.*

26 The USPTO twice dismissed Bertini's fraud on the USPTO claims for relying on conclusory
 27 statements insufficient to meet his “heavy burden.” The same result is appropriate here.

1 **1. Bertini's Claim for Fraud in the Procurement (Claim Two) Fails Because It**
 2 **Is Conclusory and Nonspecific**

3 Bertini's second cause of action alleges that Apple fraudulently procured the APPLE Registration
 4 by stating in the SOU Declaration that it used the APPLE mark in connection with all of the services in
 5 the APPLE Registration, when Bertini believes Apple was not using the mark in connection with
 6 "entertainment services." Compl. ¶¶93–106. This conclusory and inaccurate claim should be dismissed.

7 Bertini states that Apple and Mr. La Perle "had knowledge about the fact that the [APPLE mark]
 8 is not used in commerce for all services" and "intended to induce reliance upon misrepresentations
 9 regarding use of the" APPLE mark. Compl. ¶¶99–100. His Complaint, however, does not include any
 10 **facts** from which someone could draw this conclusion. Rather, Bertini merely references Apple's use of
 11 the ITUNES mark, its WWDC events, and its terms of use. None of this proves that Apple did not use the
 12 APPLE mark for entertainment services, let alone that it ***knowingly and intentionally*** misrepresented facts
 13 to the USPTO, which is required to establish fraud.

14 Bertini also alleges that his representative could not find online evidence that Apple used the
 15 APPLE mark in connection with the services in the APPLE Registration at the time Apple submitted the
 16 SOU Declaration. *Id.* at ¶104. But his representative's alleged inability to find online evidence in 2024 in
 17 no way establishes that such use did not exist in 2011 or that Apple knowingly and intentionally made
 18 a false statement to the USPTO. *See OTR Wheel, Inc.*, 897 F.3d at 1019.

19 Finally, Bertini alleges that "Apple didn't produce evidence showing use of standard character
 20 mark APPLE for sales or advertising of services listed in the" APPLE Registration during the "Opposition
 21 trial."⁶ Compl. ¶105. As an initial matter, this statement is entirely false. The TTAB decision makes that
 22 clear, with the Board stating, "we note that Respondent has introduced evidence of use of its APPLE mark
 23 alone in connection with its recited services." *Bertini v. Apple*, 2024 WL 1231233, at *12 n.14. In fact,
 24 Apple submitted "substantial" evidence to the TTAB, including webpages and promotional materials
 25 showing use of the APPLE mark for entertainment services. *Bertini*, 2024 WL 1231233, at *5–7. It

26

 27 ⁶ The parties previously litigated an Opposition proceeding before the TTAB. (Opposition No. 91229891),
 28 which involved the APPLE MUSIC mark. Apple assumes that Bertini meant to reference the Cancellation
 Proceeding (Cancellation No. 92068213), which involves the APPLE Registration, and from which
 Bertini has appealed the Board's decision against him by initiating this litigation.

1 includes more than 3,650 pages of evidence showing use of the APPLE mark alone and also with a
 2 generic/descriptive term, as in APPLE BOOKS, APPLE TV, APPLE MUSIC, APPLE NEWS, and
 3 APPLE PODCASTS. *See id.* Moreover, allegations about discovery in the TTAB proceeding do nothing
 4 to support Bertini's fraud claim, as the TTAB dismissed his fraud claims before that matter even entered
 5 discovery.

6 Accordingly, Bertini's fraud allegations related to the SOU Declaration should be dismissed. Bald
 7 assertions that do nothing more than repeat the elements of a fraud claim, without any factual support, are
 8 not enough to state a claim for fraud on the USPTO. 4 McCarthy § 31:84 ("conclusory allegations"
 9 insufficient to establish fraud); *see also Fayer*, 649 F.3d at 1064 (courts need not "assume the truth of
 10 legal conclusions merely because they are cast in the form of factual allegations").

11 In addition to being conclusory, the fraud claim related to the SOU Declaration should also be
 12 dismissed because it lacks specificity. Although Bertini states that Apple did not use the APPLE mark in
 13 connection with "entertainment services," Compl. ¶103, he does not specify which "entertainment
 14 services" or even what services in the APPLE Registration are "entertainment services." Apple provided
 15 a classification above for ease of reference by the Court, but it is in fact merely guessing as to what Bertini
 16 thinks the "entertainment services" are. Bertini's claim thus should also be dismissed for failing to satisfy
 17 the "particularity" requirement for alleging fraud. Fed. R. Civ. P. 9(b).

18 **2. Bertini's Claim for Fraud in the Maintenance (Claim Three) Fails Because It
 19 Is Conclusory and Belied by Both Allegations in the Complaint and the
 Specimen of Use Apple Submitted to the USPTO**

20 Bertini's third cause of action alleges that Apple committed fraud on the USPTO in the Kitterman
 21 Declaration by stating that Apple used its mark "in commerce on or in connection with the goods and/or
 22 services identified in the registration" when Bertini again believes Apple was not using the mark for
 23 "entertainment services." Compl. ¶¶107–120. For the reasons discussed below, this claim also should be
 24 dismissed.

25 **First**, Bertini again fails to allege *facts* supporting a fraud on the USPTO claim, as Rule 9(b)
 26 requires. Rather, Bertini supports his claim with mere conclusory statements, namely, that: (1) "Ms.
 27 Kitterman and Apple had knowledge about the fact that the Mark is not used in commerce for all services
 28 as stated in Response to Office Action and so representation about use was false"; (2) "Ms. Kitterman and

1 Apple had intended to induce reliance upon the misrepresentation regarding use of the Mark so that Apple
 2 could renew registration of the Mark”; and (3) “This statement was made with the intent to renew the
 3 registration to which Apple was otherwise not entitled.” Compl. ¶¶115–117. As discussed, *supra*, such
 4 conclusory allegations unsupported by facts are insufficient to allege fraud on the USPTO. *See* 4 McCarthy
 5 § 31:84.

6 **Second**, Bertini’s fraud claim suffers from the fatal flaw that his own Complaint and the specimen
 7 filed with the Kitterman Declaration prove: there was no false statement. As an initial matter, the
 8 Complaint itself states that Apple announced the music entertainment service Apple Music *in 2015*, years
 9 before Apple submitted the Kitterman Declaration. Compl. ¶83. Therefore, even by Bertini’s own
 10 allegations, Apple used the APPLE mark in connection with entertainment services by the time Apple
 11 filed the Kitterman Declaration.

12 In addition, Kitterman submitted a specimen with her declaration showing Apple’s use of the
 13 APPLE mark for *entertainment-related services*. As depicted above (at 5), this specimen showed the
 14 APPLE mark on the marquee for an upcoming musical performance by the artist P!nk that stated, “APPLE
 15 MUSIC PRESENTS P!NK BEAUTIFUL TRAUMA.” Ex. D. Apple thus could not have committed fraud
 16 on the USPTO in the Kitterman Declaration because it disclosed the nature of its use in connection with
 17 entertainment services, thereby allowing the USPTO to draw its own conclusions as to whether Apple
 18 used its mark for such services.

19 Several cases support this conclusion. In *Zero Motorcycles, Inc. v. Pirelli Tyre S.p.A.*, for example,
 20 the Northern District of California considered whether the defendant falsely stated that its trademark
 21 ZERO was in use when the specimen submitted to the USPTO showed the phrase “P ZERO” rather than
 22 “ZERO.” 802 F. Supp. 2d 1078, 1088 (N.D. Cal. 2011), *rev’d and remanded on other grounds*, 517 F.
 23 App’x 589 (9th Cir. 2013). The court held that Defendants’ submission of “the allegedly false statement
 24 *with the exemplar* undermines any assertion of a willful intent to deceive the PTO, since the PTO
 25 obviously could assess the accuracy of Defendants’ representation by comparing it to the exemplar.” *Id.*

26 Similarly, in *Belstone Capital, LLC v. Bellstone Partners, LLC*, the plaintiff alleged that the
 27 defendant committed fraud on the USPTO because it used the BELLSTONE mark in the phrase “Bellstone
 28 Partners, LLC” and not as a standalone term. 2017 WL 1153111, at *7–9. The Eastern District of

1 California disagreed, dismissing the fraud on the USPTO claim on a motion to dismiss because the
 2 specimen of use showed the mark exactly as it was used in commerce, and the USPTO accepted such
 3 evidence. *Id.* As the court explained, “although plaintiff may disagree with the USPTO’s decision to
 4 register the word mark ‘Bellstone’ based on a specimen that reads ‘Bellstone Partners, LLC,’ that
 5 disagreement does not make out a claim of fraud.” *Id.*

6 So too here. Apple submitted an exemplar of use from which the USPTO could assess the accuracy
 7 of Kitterman’s representations regarding Apple’s use of the APPLE mark in connection with
 8 entertainment services. Such disclosures regarding the nature of Apple’s use proves that Apple did not act
 9 with a willful intent to deceive the USPTO. *See Zero Motorcycles*, 802 F. Supp. 2d at 1088; *Bellstone*,
 10 2017 WL 1153111, at *7–9; *Paris Glove of Canada, Ltd. v. SBC/Sporto Corp.*, 84 U.S.P.Q.2d 1856, 863
 11 (T.T.A.B. 2007) (where the USPTO “reviewed the submissions and accepted the declaration” and
 12 “nothing was concealed or withheld” from the USPTO, “Petitioner has not shown that there are any issues
 13 of material fact in dispute with respect to respondent’s intent and as to whether respondent’s activities
 14 constituted use of the registered mark. Because the statements made by respondent in its combined
 15 declaration were truthful, *i.e.*, that it was using the mark as shown in the specimen submitted with the
 16 declaration, respondent’s intent in making the statements is not material.”); *OTR Wheel*, 897 F.3d at 1020
 17 (recognizing the significance of voluntary disclosure of allegedly concealed information during
 18 application process).

19 **Finally**, this fraud claim also fails Rule 9(b)’s particularity requirement. It merely states that
 20 Apple’s mark was not used in connection with “entertainment services,” without stating which
 21 entertainment services or what services in the APPLE Registration are “entertainment services.”
 22 Compl. ¶87.

23 3. **Bertini’s Other Fraud in the Maintenance Claim (Claim Four) Fails Because
 24 It Is Conclusory and Belied by the Complaint and Specimen of Use**

25 Bertini’s Fourth Claim alleges that Apple committed fraud on the USPTO in the 2018 La Perle
 26 Declaration by stating that Apple was using the APPLE mark for “entertainment services” at the time it
 27 submitted the declaration on January 17, 2018. Compl. ¶¶121–129. This claim also fails.

1 **First**, Bertini fails to support his claim with fact. Instead, he once again relies on mere conclusory
 2 allegations. *Id.* at ¶¶123–126. For the reasons stated above, such bald assertions are insufficient; they
 3 simply restate the legal standard without providing the facts necessary to prove fraud on the USPTO.

4 **Second**, the Complaint also contradicts Bertini’s baseless assertions, as Bertini himself admits that
 5 Apple announced the Apple Music entertainment service in 2015, long before Apple submitted the 2018
 6 La Perle Declaration. *Id.* at ¶83.

7 To the extent Bertini argues that Apple nonetheless acted fraudulently because use of “Apple
 8 Music” does not constitute use of the APPLE mark, his argument should be rejected. As just discussed,
 9 the USPTO accepted Apple’s specimen showing use of the phrase “Apple Music” as proof that Apple
 10 uses the APPLE Mark for entertainment services. *See Zero Motorcycles*, 802 F. Supp. 2d at 1088;
 11 *Bellstone*, 2017 WL 1153111, at *7–9. Moreover, uses of a trademark with a generic or descriptive word
 12 still constitutes use of the mark. *See supra* Section IV.B.

13 **Finally**, this claim also fails Rule 9(b)’s particularity requirement because it does not state what
 14 Bertini means by “entertainment services.” Compl. ¶87.

15 **D. Bertini’s Fifth Claim (Liability for Damages Due to Fraud) Should Be Dismissed for**
 16 **Failure to State a Claim**

17 Finally, Bertini’s fifth claim seeks damages from his fraud on the USPTO claims. Because Bertini
 18 has failed to state a claim for fraud on the USPTO in the first instance, his claim for damages resulting
 19 from the purported fraud must also be dismissed.

20 **V. CONCLUSION**

21 For the foregoing reasons, Apple respectfully requests that the Court dismiss Bertini’s Complaint
 22 in its entirety with prejudice.

1 DATED: October 4, 2024

Respectfully submitted,

2 */s/ Dale M. Cendali*
3

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CERTIFICATE OF SERVICE

On October 4, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all persons registered for ECF. All copies of documents required to be served by Fed. R. Civ. P. 5(a) and L.R. 5-1 have been so served.

/s/ Dale M. Cendali
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